DISCHARGE OF PERSONS SECONDARILY LIABLE UPON NEGOTIABLE INSTRUMENTS UNDER SUB-SECTION 6 OF SEC. 2841a (120), VIRGINIA CODE 1904.

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The Virginia Negotiable Instruments Law, Section 120 sub-section 6, (Va. Code, 1904, p. 1478) provides:

"A person secondarily liable on the instrument is discharged..... 6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

It shall be the purpose of this article to endeavor to show what constitutes an agreement *binding* upon the holder as required by the section just quoted.

It may be instructive to look for a moment at the ground upon which it is held that an endorser is discharged by such agreement. The basis of this doctrine is found in the old maxim of the Common Law: "Transactions between strangers ought to hurt no man";[1] in other words, the maker and holder have no right by a contract between themselves, to which the surety does not consent, to change the rights of the surety, and if the agreement is binding upon the holder, one of the most important rights of the surety is abridged, for the surety, under his contract, has the right at any time to pay the instrument and sue the maker at once. Now if the holder makes a binding agreement to extend the time of payment, the surety cannot upon paying off the instrument sue the maker at once, for he is merely subrogated to the rights of the holder, or to use a homely, but expressive, phrase: "He stands in the shoes of the holder," and the holder having bound himself not to sue for a definite length of time, the surety also is forbidden to enforce payment before the expiration of that period.[2] Having

[1] Quae inter alios acta sunt nemini nocere debent. 6 Coke, 1.

[2] "The surety is entitled upon paying the debt, when due, to be subrogated to the rights and remedies of the creditor, and if, by contract, the creditor has tied his hands and disabled himself from suing, so that if the surety were to pay the debt he would not be free to sue immediately, the effect is to deprive the surety of a right to which, by virtue of the original contract, he is entitled, and consequently to discharge him." Opinion of Lewis, P., in Stuart v. Lancaster, 84 Va. p. 774; see also Shannon v. McMullin, 25 Gratt. 211; Norris v. Crummey, 2 Rand. 323, at pp. 323-338; Hill v. Bull, Gilmer, 149.

thus disposed of the *entrée,* let us now turn our attention to the *piece de resistance.*

Perhaps as good a statement of the rule as is available is found in the case of *Bacon* v. *Bacon,* 94 Va. at page 691, where the law is thus stated by Judge Buchanan: "In order that a surety or endorser may be discharged for indulgence given the principal debtor it must be shown, among other things, that there was an agreement or promise, upon a valuable consideration, to indulge the principal for some definite time, or at least for a time not altogether indefinite.[3]

The first requisite is, of course, an agreement to extend, for mere indulgence by the holder of the note is not sufficient to discharge the surety,[4] and this is true, even though the endorser in fact suffer damage from such indulgence.[5] It is not necessary that the agreement be express,[6] and indeed, as we shall see, such agreements are often implied from the circumstances of the case.

Where the agreement for extension is conditional the condition must be performed, otherwise the agreement is not binding,[7] and hence it has been held in this State that where the holder of a note agrees to an extension of the time of payment on condition that the endorser consents, the endorser is not thereby discharged.[8]

The authorities without exception seem to state that in order to discharge the endorser, the agreement for extension should be between the holder and the maker, or, to state the same thing in different terms, a binding agreement between the holder and a third party will not discharge the endorsers.[9]

[3] "If indeed a creditor engages, for a good consideration to give indulgence, so as to tie up his hands from proceeding at any moment he may be required by the surety to do so, the surety is absolved, unless such indulgence is given with his consent. The constituents of this principle are, (1) a consideration; for without it, a promise to indulge is not binding; (2) a promise or agreement to indulge; for without it, the hands of the creditor are not tied, whatever collateral security he may have received; (3) that the promise should not be altogether indefinite; and (4), that the surety should not have assented to the indulgence given." Tucker, P., in Alcock v. Hill, 4 Leigh, at pp. 626-7.

[4] Bacon v. Bacon, 94 Va. 986; Norris v. Crummey, 2 Rand. 323; First National Bank v. Parsons, 45 W. Va. 688, 32 S. E. 269; Creath v. Sims 5 How: (U. S.) 492; Way v. Dunham, 166 Mass. 263, 44 N. E. 220.

[5] McKenney v. Waller, 1 Leigh, 476.

[6] Brooks v. Wright, 13 Allen (Mass.) 72; Way v. Dunham, 166 Mass. 263, 44 N. E. 220.

[7] Harnsberger v. Geiger, 3 Grait. 144; United States v. Nicholl, 12 Wheat, 505, at p. 510, 6 L. Ed. 709.

[8] Winfree v. Lexington 1st National Bank, 97 Va. 83.

[9] Wright v. Independence Bank, 96 Va. 728, at p. 731, 70 Am. St. Rep. 889; Herbert v. Servin, 41 N. J. L. 225; Cheek v. Glass, 3 Ind. 286; Bagley v. Buzzell, 19 Me. 88; 2 Daniel Neg. Ins. (3rd. Ed.) sec. 1324. *Quaere:* Under sec. 2415, Code of Virginia, where the promise to extend is made to a third party *for the benefit of the maker,* would the maker if sued by the holder in violation of such agreement have the right to rely upon such contract as made for his benefit and recover damages for such breach by way of recoupment in such action, and if so would not an endorser who might pay off the note and sue the maker stand in the holder's shoes?

Next in order we notice that the agreement in order to be binding must be based upon a valid consideration, otherwise, it is a mere *nudum pactum,*[10] and it is in this connection that we find some of the most interesting questions and no little conflict among the decisions.

A mere partial payment of the debt at maturity is not such a consideration, for it is merely doing what the maker is already bound to do,[11] but a partial payment on the debt before it becomes due is such a consideration,[12] and upon the same principle it has been held that a payment made on another debt which is not yet due is sufficient,[13] but a partial payment on another debt, the whole amount of which is already due, is not sufficient;[14] indeed the payment of the entire amount of another matured debt is insufficient.[15]

By what is probably the better view, an agreement on the part of the debtor to pay interest for a definite period of time after maturity is a sufficient consideration to constitute a binding agreement and discharge a non-consenting surety, for the debtor thereby releases the right he would otherwise have to pay the debt at any time and thus stop the interest from running upon the debt,[16] but where the promise is merely to pay interest upon the debt until paid it would seem that inasmuch as the debtor is only agreeing to do what the law would compel him to do (interest being a legal incident of debt), such a promise is not a sufficient consideration to support an agreement to extend the time of payment.[17] Where the promise on the part of the debtor is to pay an

[10] Bacon v. Bacon, 94 Va. 686; Norris v. Crummey, 2 Rand. 323; Coleman v. Stone 85 Va. p. 388; McLemore v. Powell, 12 Wheat. (U. S.) 554, 6 L. Ed. 726; Bagley v. Buzzell, 19 Me. 88.

[11] Halliday v. Hart, 30 N. Y. 474; Sully v. Childress, 106 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875; *semble*, Keffer v. Grayson, 76 Va. at p. 520.

[12] Hartman v. Danner, 74 Pa. St. 36; Cox v. Carrell, 6 Iowa, 350; Austin v. Darwin, 21 Vt. 38; Bank v. Shook, 100 Tenn. 436, 45 S. W. 338.
It would seem that a partial payment even at or after maturity at a different place from that fixed in the note, or in a different medium, or to a third person instead of the holder (at holder's request) should be held sufficient, but the writer has been unable to find any cases in which these conditions existed.

[13] Rigsbee v. Bowler, 17 Ind. 167.

[14] Jennings v. Chase, 10 Allen (Mass.) 526.

[15] Wolz v. Parker, 134 Mo. 458, 35 S. W. 1149; Pomeroy v. Slade, 16 Vt. 220.

[16] See article in 5 Va. Law Reg. p. 262, in which this view is taken by Professor L le and the authorities are collected. See also Daniel Neg. Ins. sec. 1317a and a line of New York cases cited in Olmstead v. Latimer, 158 N. Y. 313, 43 L. R. A. 685. The opinion in this case is based upon the doctrine of *stare decisis*, Chief Justice Parker, who delivered the opinion, declining to consider the reasons upon which the rule was based. Parsons v. Harrold, 46 W. Va. 122, 32 S. E. 1002, also takes a contrary view to that expressed in the text.

[17] It would seem that even if such a promise were held a sufficient consideration, nevertheless, such an agreement would not be binding so as to discharge the surety, because the extension would not be for a definite time.

usurious rate of interest, there is a conflict of authority as to whether or not this constitutes such a consideration as will make the agreement binding upon the holder and thus release a party secondarily liable.[18] Where the interest is actually paid in advance this is held to be a sufficient consideration to support an agreement for extension.[19] *A fortiori* a partial payment of the debt accompanied by an actual prepayment of the interest is sufficient.[20] The authorities are in conflict as to whether an agreement for extension can be presumed from the mere fact of payment of interest in advance of its falling due, the weight of authority apparently favoring the view that it is *prima facie* evidence of such an agreement.[21]

The giving of collateral security or a mortgage is sufficient consideration to support an agreement for extension.[22] Where the collateral is not enforcible until a future day it is held by some courts that an agreement to extend will be implied,[23] but the contrary has also been held.[24] It would seem that where the collateral is enforcible immediately no such presumption should arise.[25] Where the holder of the note takes a new note from the maker payable at a future day in the place of an old note there is such an extension of time as will operate to release a non-consenting surety,[26] but the rule would seem to be otherwise where the new note is payable on demand,[27] and the same rule applies to checks

[18] See what is said in this connection in Armistead v. Ward, 2 Pat. & H. 504, see also 7 CYC, 735, 902

[19] See State Sav. Bank v. Baker, 93 Va. 510; Armistead v. Ward, 2 Pat. & H. 504, at p. 516.

This is true even though the interest thus prepaid is in excess of the legal rate: Armistead v. Ward, 2 Pat. & H. 504; Glenn v. Morgan, 23 W. Va. at p. 470; Scott v. Harris, 76 N. Car. 205; Stone River Nat. Bank v. Walker, 104 Tenn. 11, 55 S. W. 301.

[20] Dey v. Martin, 78 Va. 1. The syllabus to this case is misleading, as the payment of interest in advance of its coming due is omitted entirely from the statement of the facts therein.

[21] St. Paul Trust Co. v. Driscoll, 64 Minn. 439, 67 N. W. 350; Shelly v. Bristol Sav. Bank, 63 Conn. 83. 26 Atl. 474; Peoples Bank v. Pearsons, 30 Vt. 711. *Contra*, Oxford Bank v. Lewis, 8 Pick. (Mass.) 458; see also Crosby v. Wyatt, 10 Shep. (Me.) 156 at p. 162.

[22] Kane v. Cortesy, 100 N. Y. 132, 2 N. E. 874; Martin v. Bell, 3 Harrison (N. J. L.) 167; McKinnon v. Palen, 62 Minn. 188, 64 N. W. 387.

[23] Harshaw v. McKesson, 65 N. C. 688. The terms of the mortgage in this case apparently had great influence upon the decision reached.

[24] United States v. Hodge, 6 How. (U. S.) 279; Fisher v. Denver National Bank, 22 Col. 373, 45 Pac. 440; Carey v. White, 52 N. Y. 138. See, however, what is said of this last case in Hubbard v. Gurney, 64 N. Y. at p. 468.

[25] Peninsular Sav. Bank v. Hosie, 112 Mich. 351, 70 N. W. 890; Continental L. Ins. Co. v. Barber, 50 Conn. 567. This would seem to follow from the fact that while indulgence may be presumed from the giving of such collateral, an agreement to indulge for a *definite time* may not be.

[26] Armistead v. Ward, 2 Pat. & Heath 504; Hubbard v. Gurney, 64 N. Y. 457.

[27] Peninsular Sav. Bank v. Hosie, 112 Mich. 351, 70 N. W. 890; Continental L. Ins. Co. v. Barber, 50 Conn. 567.

as well as notes.[28] It is held in Virginia that the taking of a new note raises a *prima facie* presumption of an agreement to extend the time and thus release the endorsers, but that this presumption may be rebutted by evidence showing that in fact there was to be no suspension of the right to sue on the original debt, in which event, of course, the sureties are not discharged,[29] but in some jurisdictions it is held that this presumption is conclusive and can not be rebutted.[30]

Upon general principles of contract law we know that the consideration need not be for the direct benefit of the promisor, but may move to a third party at his request, and so we find that it has been held by the Supreme Court of the United States that a release by the maker of a third person from imprisonment under execution at the request of the holder is a sufficient consideration to support an agreement to extend time and thus release the sureties.[31] The consideration may also move from a third person,[32] and so an absolute promise by an endorser to pay the note is such a consideration for the holder's agreement to extend as to discharge a subsequent endorser.[33]

And now we notice the fourth and last requisite: the agreement for extension must be for a "definite time or at least for a time not altogether indefinite";[34] but while an extension for a definite period of time is absolutely necessary, it is not requisite that the extension be for a lengthy period of time, and no matter how short the period may be, if it is definitely fixed, the surety will be discharged.[35] Even an extension for only one day has been held sufficient,[36] and, in the language of our own Supreme Court of Appeals, "Any change of the contract by the principal, however slight, without the consent of the surety releases the latter from all further liability."[37]

[28] Place v. McIlvain, 38 N. Y. 96.

[29] Armistead v. Ward, 2 Pat. & Heath, 504; see also Calloway v. Price, 32 Gratt. 8; Stuart v. Lancaster, 84 Va. at p. 775.

[30] Fillows v. Prentiss, 3 Denio (N. Y.) 512, 45 Am. Dec. 484; Anderson v. Marrett, 58 Me. 539.

[31] U. S. Bank v. Hatch, 6 Pet. (U. S.) 250, 8 L. Ed. 387.

[32] Kester v. Hulman, 65 Ind. 100.

[33] Stallings v. Johnson, 27 Ga. 564 (cited to this effect in 7 CYC, 902.)

[34] Bacon v. Bacon, 94 Va. 691; Alcock v. Hill, 4 Leigh, 626.

[35] Carey v. White, 52 N. Y. 138; Siebeneck v. Bank, 111 Pa. St. 187, 2 Atl. 485; *In re* Bishop's Estate, 195 Pa. St. 85, 45 Atl. 582.

[36] Fillows v. Prentiss, 3 Denio (N. Y.) 512, 45 Am. Dec. 484.

[37] Exchange Building &c. Co. v. Bayless, 91 Va. at p. 140.